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Nos. 06-969 and 06-970

In The Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT,
v.
WISCONSIN RIGHT TO LIFE, INC., APPELLEE.

SENATOR JOHN MCCAIN, ET AL., APPELLANTS,
v.
WISCONSIN RIGHT TO LIFE, INC., APPELLEE.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, JOYCE MEYER MINISTRIES, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., LINCOLN INSTITUTE, PUBLIC ADVOCATE OF THE UNITED STATES, DOWNSIZEDC.ORG, AND DOWNSIZE DC FOUNDATION IN SUPPORT OF APPELLEE

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INTEREST OF AMICI CURIAE

The *amici curiae*, Citizens United ("CU"), Citizens United Foundation ("CUF"), Gun Owners of America, Inc. ("GOA"), Gun Owners Foundation ("GOF"), Joyce Meyer Ministries ("JMM"), Conservative Legal Defense and Education Fund ("CLDEF"), Free Speech Coalition, Inc. ("FSC"), Free Speech Defense and Education Fund, Inc. ("FSDEF"), The Lincoln Institute for Research and Education ("Lincoln"), Public Advocate of the United States ("PA"), DownsizeDC.org, Inc. ("DDC"), and Downsize DC Foundation ("DDCF"), are nonprofit organizations sharing a common interest in the proper construction and application of the Constitution and laws of the United States.[1] Each of the *amici* was established, *inter alia*, for education and related purposes concerning the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code ("IRC").[2] For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the original text of the United States Constitution.

The First Amendment issues presented in this case directly impact the rights of individuals and organizations to express views on educational, social, political, and related topics and issues, as well as to petition and assemble, as guaranteed by the First Amendment, and are of extreme interest and importance to these *amici*. In the past, these *amici* have filed *amicus curiae*

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

briefs in such matters before this Court.[3]

In carrying out their respective tax-exempt missions, all of these *amici* may be directly impacted by this Court's resolution of the issues in this case. In the publication and dissemination of educational materials concerning public policy issues, it is often appropriate, if not necessary, for such materials to include the names of current legislators who happen to be candidates for reelection. According to the Federal Election Commission ("FEC"), none of these *amici* would be permitted to broadcast on television or radio any such materials during portions of a federal election cycle.[4]

SUMMARY OF ARGUMENT

Appellants' arguments rest upon the erroneous premise that Congress enacted BCRA pursuant to an alleged power to

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[3] Three of these *amici* — CU, GOA and DDC (then Real Campaign Reform.org) — were plaintiffs in the litigation that culminated in this Court's upholding challenged provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. No. 107-155, 116 Stat. 81). *See* McConnell v. Federal Election Commission, 540 U.S. 93 (2003). Furthermore, two of these *amici* — CU and CUF — were *amici* before this Court in support of the successful claim of appellee Wisconsin Right to Life, Inc. ("WRTL") that McConnell did not foreclose "as applied" challenges to the constitutionality of BCRA's "electioneering communications" provisions. *See* Wisconsin Right to Life, Inc. v. FEC, 546 U.S. ___, 163 L.Ed.2d 990 (2006) ("WRTL I").

[4] Although the prohibition against electioneering communications by IRC Section 501(c)(4) organizations, such as CU, GOA, FSC, DDC, and PA, has been in force since the passage of BCRA, until recently, IRC Section 501(c)(3) organizations, such as CUF, GOF, JMM, CLDEF, FSDEF, Lincoln and DDCF were specifically exempted from the prohibition by regulation. That exemption, however, was found lacking by the district court in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), and subsequently repealed. *See* FEC Final Rules, 70 Fed. Reg. 75,713 (Dec. 21, 2005).

regulate the federal "political process." Instead, as this Court held in Buckley v. Valeo, and reaffirmed in McConnell v. FEC, BCRA rests upon the claim that Congress may enact campaign finance laws as a means to ensure the integrity of the "electoral process." Having failed to show that applying BCRA to WRTL's legislative-issue ads is an appropriate means to secure the integrity of a federal election, Appellants' arguments that BCRA applies even to genuine issue ads should be rejected.

Moreover, the First Amendment petition, assembly, speech, and press guarantees prohibit applying BCRA Section 203 to to WRTL's genuine issue ads. First, WRTL's right to **petition** the government for redress of grievances would be abridged because the the ads at issue target the people of Wisconsin as **constituents, not as electors,** urging them to contact their two senators to obtain specific relief on a public policy matter before them.

Second, WRTL's right of peaceable **assembly** would be abridged because BCRA Section 203 imposes upon WRTL an organizational and financial structure as a condition precedent to its sponsoring an assembly which is both **peaceful** and for a **lawful purpose**.

Third, WRTL's freedom of **speech** would be abridged by the failure of the FEC to provide adequate procedures whereby WRTL may obtain a timely and effective **judicial determination** that its ads are protected core political speech.

Fourth, WRTL's freedom of **press** would be abridged by the FEC's intrusion upon the **editorial freedom** secured to all Americans, not limited to the institutional media, as discriminatorily provided in BCRA Section 201(a).

ARGUMENT

I. THE ARGUMENTS OF APPELLANTS ARE MISGUIDED, AND SHOULD BE REJECTED

The Appellants claim that the critical issue in this case is whether the WRTL television and radio "issue ads" are "the functional equivalent" of "express advocacy" regarding the election of a candidate for federal office. *See* Brief for Appellant FEC ("FEC Br."), 18-20, 28, 32; Brief for Appellants McCain, Baldwin, Shays, and Meehan ("Interv. Br."), pp. 3-4, 14-16, 19-21. Conspicuously absent from both briefs, however, is any effort to demonstrate that the WRTL ads were "sham issue ads," functioning as "express [election] advocacy," like those found in McConnell, 540 U.S. at 206. In effect, both the FEC and the Intervenors have contended that **any** issue ad, genuine or not, broadcast during the 30-day and 60-day periods specified in BCRA Section 203 is subject to BCRA's "electioneering communication" limitations. *See* FEC Br., p. 31; Interv. Br., pp. 19-21. According to the FEC and the Intervenors, such an ad must either contain no reference to the elected official who is such a candidate or be funded by a PAC. *See* FEC Br., pp. 30-32, 35; Interv. Br., pp. 29-31. In taking this position, the FEC and the Intervenors have contended, in effect, that McConnell leaves **no** room for an as-applied challenge, an interpretation unanimously rejected by this Court. WRTL v. FEC ("WRTL I"), 546 U.S. ___, 163 L.Ed.2d 990 (2006). Moreover, their claim is based upon an erroneous reading of McConnell.

A. Congress Does Not Have Plenary Power to Protect the Integrity of the Nation's "Political Process."

The Intervenors have claimed that "[f]or a century, Congress has worked to protect the **integrity of the political process** by

regulating the use of corporate funds to influence federal elections," and that "[t]his Court reaffirmed in *McConnell* what is now well-established: that Congress has a compelling interest in preventing the 'corrosive and distorting effects' of corporate and union treasuries on the **integrity of the political process**." Interv. Br., pp. 4, 17 (emphasis added). The FEC has echoed this view, asserting that the McConnell Court deferred to Congress's definition of "electioneering communication," because of the "substantial experience of its Members as participants in the **political process**...." FEC Br., p. 30 (emphasis added). Thus, according to Appellants, BCRA's "electioneering communications" restrictions are constitutionally justified as a subset of Congress's broad power to regulate the "political process" — the process by which public policy is formulated and administered through the interaction between political leadership and public opinion.[5] But neither the Constitution nor this Court has ever countenanced such an extravagant view of plenary congressional power over the nation's political life.

In Buckley v. Valeo, this Court found congressional regulation of campaign finance to be constitutionally "appropriate" only as a means to ensure "the integrity of the **electoral process**,"[6] **not** as a means of protecting the integrity of the **political process.** Indeed, the Buckley Court stated that Congress's authority to regulate the financing of campaigns for federal office was derived from "[t]he [enumerated] constitutional power of Congress to **regulate federal elections**," as recognized by previous courts dating back to the

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[5] *See generally* the definition of "political process" in Webster's Third International Dictionary, p. 1755 (Merriam & Co., Springfield, Mass.: 1964).

[6] *See* 424 U.S. 1, 10, 25-29 (1976) (emphasis added).

early 20th century. *Id.*, 424 U.S. at 13 (emphasis added). The McConnell Court did not depart from this historical foundation; rather, it reinforced the proposition that campaign finance regulations have always been understood as a "necessary and proper" means available to Congress to protect the **electoral process** from "corruption and the appearance of corruption." *See* McConnell, 540 U.S. at 114-132. Thus, the McConnell Court concluded that "BCRA's central provisions are designed to address Congress's concerns about the increasing use of soft money and issue advertising to influence **federal elections**." *Id.*, 540 U.S. at 132 (emphasis added).

Notwithstanding this clear directive, neither the FEC nor the Intervenors have made any effort to demonstrate that application of BCRA Section 203 (2 U.S.C. § 434(f)(3)) in this case is "plainly adapted" to secure the integrity of the **federal electoral process** from corruption or the appearance of corruption. Yet, this Court always has insisted that, to justify a statute enacted pursuant to Congress's power "to make ... laws which shall be necessary and proper for carrying into execution" the federal government's enumerated powers, Congress must demonstrate not only that the end is "legitimate," but also that the means chosen to achieve that end must be "appropriate ... **plainly adapted to that end** ... **not prohibited,** but consist with **the letter and spirit** of the constitution...." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

B. The First Amendment Secures the Integrity of the Nation's "Political Process."

Having no regard for the role of the First Amendment to secure the integrity of the nation's political process, the FEC and the Intervenors have **unconstitutionally assumed** that the application of BCRA Section 203 to WRTL's ads is "not

prohibited," but rather "consist[s] with the letter and spirit of the constitution." Thus, the FEC and the Intervenors have placed a heavy burden upon WRTL to show that its three broadcast issue ads did **not** function as election advocacy and, therefore, are not governed by BCRA Section 203. *See* FEC Br., pp. 32-36; Interv. Br., pp. 19-21. By attempting to foist this burden upon WRTL, the FEC and the Intervenors virtually have ignored the fact that the First Amendment freedoms of speech, press, assembly, and petition were ratified as part of the United States Constitution to keep Congress's **hands off** the "political process," forbidding it to make any law "abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances." As this Court observed over a half century ago:

> The vitality of civil and political institutions in our society depends on free discussion.... [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people.... The right to speak freely ... is therefore one of the chief distinctions that sets us apart from totalitarian regimes.... That is why freedom of speech ... is ... protected against censorship or punishment, **unless shown likely to produce a clear and present danger of a serious substantive evil**.... There is no room under our Constitution for a more restrictive view. [Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (emphasis added).]

Having neglected to show that a failure to apply BCRA's Section 203 to WRTL's three ads would create a "clear and present danger" to the integrity of the electoral process, the FEC and the Intervenors have relegated the freedoms of speech,

press, assembly, and petition to near obscurity in their briefs. Neither brief contains quotes from, or even paraphrases, the First Amendment text, and each dispenses completely with any analysis based upon that text — notwithstanding this Court's salutary rule of construction that "every word [of the Constitution] must have its due force, and appropriate meaning...."[7] The 50-page FEC brief mentions the "First Amendment" only four times, twice invoking it in descriptive quotes from the district court opinion (FEC Br., pp. 37, 41) and twice more alluding to unnamed "First Amendment values."[8] FEC Br., pp. 27 and 41. While the 43-page Intervenors' Brief refers to the "First Amendment" six times, those references serve primarily to rehearse what this Court wrote in a prior case, rather than to apply the First Amendment's constitutional principles to this case. *See* Interv. Br., pp. 19, 21, 29, and 35. Having neglected the relevant constitutional language, the FEC and the Intervenors have failed to recognize how the application of BCRA's Section 203 to WRTL's television and radio ads violates the freedoms secured by the First Amendment.

C. McConnell and Buckley Should Be Reconsidered.

Instead of relying upon the First Amendment to secure the integrity of the political process, the Intervenors have staked their claim on a proposition gleaned from isolated passages from the McConnell and Buckley cases to support their novel proposition that "'[i]ssue ads' are entitled to no greater

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[7] *See* Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 77 (1946).

[8] As Jacques Barzun has observed: "In any context the word *values* is surely the emptiest in current use." J. Barzun, From Dawn to Decadence, p. 769 (Harper/Collins, N.Y.: 2000) (italics original).

constitutional protection than express electioneering." *See* Interv. Br., pp. 19-20; FEC Br., pp. 29-30. To the extent that McConnell and Buckley could be so construed,[9] then this Court should reconsider those cases, determining that both issue and electioneering communications are protected under the freedom of the **press**, as set forth in Part V, *infra*.

II. AS APPLIED, BCRA SECTION 203 ABRIDGES THE RIGHT OF WRTL TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

In its Response to Appellants' Jurisdictional-Statements, WRTL focused primarily upon its First Amendment petition claim,[10] emphasizing that the three broadcast ads at issue in this case were protected by the "right of corporations to **petition** legislative and administrative bodies," citing First National Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978). *See* Appellee's Response to Appellants' Jurisdictional Statements, p. 6 (emphasis added). The district court essentially agreed, finding that the **ads** did "not mention an election, a candidacy, or a political party, nor ... comment on a candidate's character, actions, or fitness for office, [but rather] **describe[d]** an issue that had been, and was likely to be, an **ongoing issue of legislative concern** in the Senate... **asking the listener** to contact *both* Senator **Feingold** [up for reelection] and Senator **Kohl** [not running for office] to ask **them** to oppose judicial filibusters." *See* WRTL v. FEC, 466 F. Supp. 2d 195 at 207 (D.D.C. 2006) (emphasis added).

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[9] *See, e.g.*, McConnell, 540 U.S. at 205; Buckley, 424 U.S. at 48.

[10] *See* Amended Verified Complaint for Declaratory and Injunctive Relief, ¶¶ 63 and 69, R. 30.

The FEC brief has taken issue with this finding, calling the district court's "distinction between issue advocacy and electioneering ... unrealistically sharp" and, therefore, a "critical error," claiming that there is no "clear divide between electoral advocacy and 'genuine issue advertisements.'" *See* FEC Br., p. 29. Relying on Buckley, the FEC has asserted that, because "'discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,'" such political realities leave no room for the enforcement of any constitutional distinction. *See id.*, p. 30. But that is not what the Buckley Court concluded. Instead, citing Thomas v. Collins, 323 U.S. 516, 535 (1945) — the very passage relied upon by the district court in drawing its "sharp distinction" — the Buckley Court drew a precise line **differentiating** communications targeting the people as **electors** from those targeting people as **constituents**. *See* Buckley, 424 U.S. at 42-43. Although the McConnell Court discarded the Buckley bright-line test of "express words of advocacy," it did **not** adopt BCRA's Section 203 definition of "electioneering communications" as the new bright-line test, sweeping even "genuine issue ads" into Congress's regulatory dust pan, thereby leaving no room for an as-applied challenge. *Compare* WRTL I, 163 L.Ed.2d at 993, *with* FEC Br., pp. 30-31. Thus, as the district court ruled, by appealing to the two Wisconsin senators to act on a legislative issue before them, the WRTL ads are not the kind of ads that BCRA Section 203 may constitutionally regulate.

A. The Right to Petition Secures the Right of the People to Influence Their Elected Government Officials on Specific Policy Matters before Them.

As important as the right to influence public policy decision-making through the elective franchise has become, the right of the people to influence the formulation and implementation of

public policy did not begin at — nor is it limited to — the ballot box. Rather, the practice of petitioning governing authorities to act favorably on matters of public concern dates back to the Magna Carta,[11] and was firmly established as a right of every Englishman by the English Bill of Rights of 1689: "That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."[12] Because the right of petition originated at a time in English history when the elective franchise was severely limited,[13] America's disenfranchised founders embraced the right of petition as the very "capstone" of the Declaration of Independence:[14]

> In every stage of these oppressions we have **petitioned for redress** in the most humble terms. Our repeated **petitions** have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be a ruler of a free people. [Declaration of Independence, reprinted in Sources at 321 (emphasis added).]

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[11] *See* The Magna Carta, ¶ 61, reprinted in Sources of Our Liberties (hereinafter "Sources") at 20-21 (R. Perry, ed., ABA Found. Rev. Ed. 1978). *See also* N. Smith, "'Shall Make No Law Abridging ...' An Analysis of the Neglected, but Nearly Absolute Right of Petition," 54 *U. Cin. L. Rev.* 1153, 1154 (1986) (hereinafter "Neglected Right of Petition").

[12] *See* Bill of Rights, "Rights of the People," ¶ 5, reprinted in Sources at 246. *See also* G. Lawson and G. Seidman, "Downsizing the Right to Petition," 93 *Nw. U. L. Rev.* 739, 747 (1999).

[13] *See* G. Mark, "The Vestigal Constitution: The History and Significance of the Right to Petition," 66 *Fordham L. Rev.* 2153, 2169, 2181 (1998) (hereinafter "Significance of Petition").

[14] *Id.* at 2191-2192.

This right of petition was affirmed as an inherent right of all of the people in several of the early state constitutions and in the first article of the federal Bill of Rights.[15] And even though the franchise has been enlarged by the 15th, 19th, 24th, and 26th Amendments, the right of petition remains unchanged, securing to the people, in their capacity as **constituents** of their elected officials, continuing access to those officials because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *See* Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961). Further, as this Court has previously recognized, the right of petition extends to publicity campaigns — such as WRTL's grassroots lobbying in this case — that are designed to stimulate others to communicate their views on matters of public policy even though the catalytic communication, itself, is not directed to the appropriate government officials. *See id.*, 365 U.S. at 129-30, 138.

In times past, people who lacked ordinary access to their elected representatives exercised their right of petition in its "pristine and classic form," appearing at the seat of government in a direct personal appeal to those government officials who had the power to redress their grievances. *See, e.g,* Edwards v. South Carolina, 372 U.S. 229, 235 (1963). Today, grassroots lobbying campaigns such as the one launched by WRTL's television and radio ads play an even more significant role in enabling the people to communicate with their elected officials by mail, telephone, facsimile, and e-mail.

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[15] *See* Sources at 422, 426. *See also* J. Spanbauer, "The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth," 21 *Hastings Const. L. Q.* 15 (1993).

B. The WRTL Ads Are Genuine Petitions to the Government for Redress of Grievances.

Without question, each of the three WRTL ads qualifies as a First Amendment petition. First, each is a "**petition to the government**," that is, each urged the viewers or listeners as **constituents** of the two named senators to communicate to those senators in their capacity as elected governmental officials, **not** as **electors** to vote for or against either senator as a candidate for election to federal office.[16] Second, each ad urged the people to seek "**redress**," that is, specific action on an issue currently before the Senate, the very body of government that had the authority to influence the action necessary to provide the remedy sought.[17] Third, each ad concerned a "**grievance**," namely, a complaint against "a group of Senators ... using the filibuster delay tactic to block federal judicial nominees...."[18] Thus, the content of the three ads clearly satisfy the criteria by which a First Amendment petition has historically been measured. *See* Mark, "Significance of Petition," 66 *Fordham L. Rev.* at 2173-74. *See also* Smith, "Neglected Right of Petition," 54 *U. Cin. L. Rev.* at 1178-79.

The FEC and Intervenors would have this Court believe otherwise, likening the WRTL ads to an ad "exhorting viewers to 'call Jane Doe and tell her what you think.'"[19] *See* FEC Br., pp. 31, 33; Interv. Br., pp. 22-24. But WRTL's ads are a far cry from the so-called sham issue ads upon which the

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[16] *See also* WRTL v. FEC, 466 F. Supp. 2d at 3-5, 21-22.

[17] *See id.*

[18] *See id.*, 466 F. Supp. 2d at 200 n.3 and 200 n.4.

[19] *See* McConnell, 540 U.S. at 206 n.17.

"paradigmatic 'Jane Doe' ads" were based. First, such "Jane Doe" ads were found to be addressed to the people **not** as **constituents** of the elected officials in a position of governmental authority, but as **electors** of persons seeking election to public office, the three-judge district court determining that the "Jane Doe" paradigm was based upon "candidate-centered issue advertisements," not "legislative-centered" ones. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 881 (D.D.C. 2003) (Leon, J., concurring).[20] In contrast, the WRTL ads were addressed **not** to Senator Feingold as a candidate, but to Senators Feingold and Kohl as sitting Senators, since the two of them, not just the one, were "the government" to which the petition was directed and in whom the power to provide the requested relief was vested.

Second, the "Jane Doe" ads did not contain specific requests for "redress" of "grievances," but rather generalized "exhortations"[21] or commendations[22] directed at both office holders and challengers. In contrast to such generalities, all three WRTL ads focused on a specific grievance, coupled with a specific call to action:

> [A] group of Senators is filibustering — blocking qualified [judicial] nominees .... Contact Senators Feingold and Kohl and tell

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[20] *See* McConnell, 251 F. Supp. 2d at 304 (Henderson, J.), 532 (Kollar-Kotelly, J.), and 875 (Leon, J.).

[21] *See* 251 F. Supp. 2d at 304 (Henderson, J.). *See, e.g.*, the Congressman Ganske ad quoted in McConnell, 251 F. Supp. 2d at 532 (Kollar-Kotelly, J.) and 876 (Leon, J.).

[22] *See* McConnell, 251 F. Supp. 2d at 304 (Henderson, J.). *See, e.g.*, the Congressman Hostettler ad quoted in McConnell, 251 F. Supp. 2d at 879 (Leon, J.).

them to oppose the filibuster. [WRTL v. FEC, 466 F. Supp. 2d at 200 n.5.]

C. WRTL's Right to Petition the Government Has Been Unconstitutionally Abridged.

Both the FEC and the Intervenors have stressed that the application of BCRA's "electioneering communication" rules to the WRTL ads does not impose a "'complete ban' on [WRTL's] speech." *See* Interv. Br., p. 29; FEC Br., p. 7. Instead, the FEC has claimed that application of BCRA Section 203 to the WRTL ads "imposes relatively minor burdens,"[23] while the Intervenors see no "undue burden," because BCRA affords WRTL "ample alternative means to disseminate its message" (*see* Interv. Br., p. 15), namely, paying for the ads out of segregated funds,[24] or restructuring itself as an "MCFL-type" organization,[25] or using media other than television or radio,[26] or omitting any reference "clearly identifying" Senator Feingold.[27] Thus, the FEC has contended that WRTL would "suffer no substantial impairment of its ability to engage in issue advocacy,"[28] and the Intervenors have claimed that the "burden" placed by BCRA Section 203 on WRTL's "First Amendment rights" is "tolerable in view of the compelling governmental interest at stake." *See* Interv. Br., p. 29.

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[23] *See* FEC Br., p. 35.

[24] *See* FEC Br., p. 36; Interv. Br., pp. 29-30.

[25] *See* FEC Br., p. 36, n.9; Interv. Br., pp. 29-30.

[26] *See* FEC Br., pp. 6 n.2, 36; Interv. Br., p. 31 n.20.

[27] *See* FEC Br., p. 36; Interv. Br., p. 20.

[28] *See* FEC Br., pp. 35-36.

Not once has the FEC or the Intervenors claimed, however, that the burden imposed by BCRA Section 203 did not "abridg[e]" WRTL's petition rights. Yet, that is the ultimate **legal** issue in this case. The First Amendment does not secure the freedoms of speech, press, assembly, and petition against "complete bans," or "substantial impairments" or "undue burdens," no matter how "tolerable." Rather, the First Amendment prohibits "Congress from making any law **abridging"** those freedoms. At the time the First Amendment was ratified, the word "abridging" meant "shortening" or "lessening," as well as "depriving" or "debarring."[29] And while "depriving" and "debarring" connoted a "taking away," both terms also meant "hindering from enjoying." In short, the word "abridging" would appear to prohibit any "burden" upon the exercise of one of the specified rights, without regard to whether it was "undue," or "substantial," much less a "complete ban." Thus, the FEC's contention that BCRA's Section 203 has placed only "minor burdens on corporate speakers" or did not "substantial[ly] impair[] its ability to engage in issue advocacy"[30] should be disregarded as irrelevant, unsupported by the text.

Equally insupportable in light of the plain meaning of "abridging" is the Intervenors' assertion that if Congress has a "compelling" enough reason, then it may "burden" one or more of the named freedoms. *See* Interv. Br., p. 29.[31] Rather, as

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[29] *See* Noah Webster, An American Dictionary of the English Language (photo. reprint 1996) (First edition, 1828).

[30] *See* FEC Br., pp. 35-36.

[31] Intervenors' argument here is reminiscent of the wartime rationale found in Korematsu v. U.S., 323 U.S. 214, 216 (1944), that "pressing public necessity" justified the wholesale segregation of Japanese-Americans because it was "impossible to bring about an immediate segregation of the

Justice Hugo Black once observed :

> [T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in the field. [I]t cannot be denied that the very object of adopting the First Amendment ... was to put the freedoms protected there completely out of the area of any congressional control. [Konigsberg v. State Bar of Calif., 366 U.S. 36, 61, 68 (1961) (Black, J., dissenting)].

Hence, he concluded, the right "to think, speak, or publish ... cannot be taken away if the Government finds it sufficiently imperative ... to do so." *Id.* at 68.

While the right to petition the government for redress of grievances is closely related to the freedoms of speech, press and assembly, it secures a right that is distinct from the other three and, as affirmed by the English Bill of Rights, absolutely protected against **any government-imposed impediments** upon its exercise. *See* Smith, "Neglected Right of Petition," 54 *U. Cin. L. Rev.* at 1180. Indeed, because the very nature of a First Amendment petition is addressed to the government, any effort by the government to limit that right is not only suspect as self-serving, but violative of the principle of "reciprocal duties" between the people and their elected officials — the petitioners, by the petition itself, having acknowledged the legitimacy of the government, in exchange for their officials' "listening" to the complaints of their constituents. *See* Mark,

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loyal from the disloyal...."

"Significance of Petition," 66 *Fordham L. Rev.* at 2169-70.

Clearly, BCRA Section 203 impedes WRTL's efforts to petition the government. First, it **prescribes** the medium by which WRTL may submit its request, having exempted the "non-broadcast" media, such as "billboards, newspaper and magazine advertisements, brochures, handbills, ... the telephone and the Internet,"[32] thereby depriving WRTL of access to the most powerful means by which it may reach the constituents who are in a position to influence the government action that it seeks. Second, it **prevents** WRTL from identifying one of the two government officials who are in a position to redress WRTL's grievance, requiring the ads to be addressed either to one Senator only or, if to both, identifying Senator Feingold as the unknown Senator.[33] Third, it **dictates** how the citizens who met to form WRTL are permitted to organize and finance their efforts if they wish to participate fully in the give-and-take process by which public policy decisions are made, requiring it to participate in the on-going process of government in the same way as it would be permitted to participate in the electoral process alone.[34]

Efforts by Congress to impede input from citizens are not new. In 1840, the U.S. House of Representatives adopted its notorious Rule XXI, banning abolitionist or anti-slavery petitions from being received or entertained. *See*

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[32] *See* FEC Br., p. 6 n.2; Interv. Br., p. 31 n.20.

[33] *See* Interv. Br., p. 31. While the Intervenors now appear to concede that the ads could be addressed to both senators, so long as Senator Feingold is not named, their proposed textual compromise would not appear to satisfy the FEC's position that the ad would be permissible only if it "omitted any reference to Senator Feingold." *See* FEC Br., p. 36.

[34] FEC Br., p. 36; *see* Interv. Br., pp. 29-31.

Congressional Globe, 26th Congress, 1st Session (Jan. 28, 1840). Spearheaded by the efforts of Congressman John Quincy Adams, this rule was abolished on December 3, 1844, in recognition of the reciprocal duty imposed upon the House by the petition guarantee. *See* III Cyclopedia of Political Science, Political Economy, and the Political History of the United States, § 53 (J.J. Lalor, ed., New York: 1899).

Certainly Adams's success in restoring the operative principle of "reciprocal duty" to the popular petition process in the House constituted a signal victory that government officials do not stand *in loco parentis* over the people who put them there. However, that principle now again is in jeopardy, put at risk by Congressional Intervenors who chafe under the limitations on their power imposed by the First Amendment, and also threatened by the instrumentality that they created to regulate the political process by which they may be challenged for reelection. By this point in American history, it would be naive indeed to assume that those who write the laws are not tempted to tailor the rules of politics so as to minimize unwanted criticism from a well-organized and funded citizenry. Indeed, the threat has become so great that it may well be that the principal concern regarding corruption in government is that which would inevitably follow Congress being given free reign to regulate and even criminalize constitutionally-permitted participation in the political process. After popular election, Members of Congress have a continuing duty at least to tolerate any lawful input from their constituents and the people by organizational and financial means not regulated by Congress. Properly applied in this case, the petition guarantee serves as an "external control" to guard against "the abuses of government," in recognition of the fact, as James Madison reminded us, that men are not "angels." *See Federalist 51* reprinted in The Federalist, p. 269 (G. Cary and J. McClellan, eds., Indianapolis: 2001).

III. AS APPLIED, BCRA SECTION 203 ABRIDGES THE RIGHT OF WRTL PEACEABLY TO ASSEMBLE.

Historically, the right of the people to petition the government for redress of grievances has been linked to the right of the people to assemble. *See* 2 J. Story, Commentaries on the Constitution Section 1893 (5th ed. 1891). After all, the right to petition was usually exercised by a personal gathering of people, physically assembled to submit the petition to the government official(s) with authority to provide the requested redress. *See* Edwards v. South Carolina, 372 U. S. at 235. And, as Justice Story observed, the right of assembly when coupled with the right of petition "results from the very nature of [a republican government's] structure and institutions." J. Story, Commentaries on the Constitution at Section 1894.

As long as an assemblage is conducted in an orderly and peaceful way, and as long as it promotes lawful change of government policy — such as was the case involving the WRTL ads — there is no constitutional justification for interference with such an assemblage for the "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875).

Neither the FEC nor the Intervenors have claimed that the WRTL ads threatened a breach of the peace or called for anything but peaceable political action. Yet, according to their "constitutional" perspective, Congress may authorize imposition of serious civil penalties — or in the case of an allegedly knowing and willful violation, even criminal fines and imprisonment — against any person or entity that would broadcast an ad such as WRTL's during the forbidden 30-day

and 60-day election periods. *See generally* 2 U.S.C. § 437g. In essence, the FEC and the Intervenors would brand organizations like WRTL as political outlaws, ineligible to participate fully in the process by which public policy is formulated and implemented.

The only justification provided by the FEC and the Intervenors to thwart WRTL's ads is the claim that the ads **really** intended to influence, and will have the effect, of influencing the 2004 Wisconsin election. *See* FEC Br., pp. 43-49; Interv. Br., pp. 21-28. But **neither** claims that such influence would **corrupt** or have the **appearance of corrupting** that election. Instead, both assumed that, if the election were influenced, necessarily it would be corrupted, or at least give the appearance of corruption, because the ads were paid for, in part, by monies drawn from the general treasuries of some unnamed business corporations.

According to the FEC and the Intervenors, the WRTL ads could have been broadcast under different auspices, *i.e.*, by WRTL's PAC or by a WRTL restructured as a "MCFL-type" organization. *See* FEC Br. 36, and n. 9; Interv. Br., pp. 29-31. However, the Intervenors' and the FEC's effort here to disqualify WRTL from full participation in the political process because its ads were funded, in part, by monies drawn from the general treasuries of business corporations is reminiscent of past unconstitutional efforts, such as that to prohibit the Communist Party — an organization dedicated to the violent overthrow of the government — from sponsoring a peaceful assembly called "to discuss the public issues of the day ... in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances"[35]:

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[35] DeJonge v. Oregon, 299 U.S. 353, at 366 (1937).

> The question, if the right[] of ... peaceable assembly [is] to be preserved is **not as to the auspices** under which the meeting is held, **but as to its purpose**.... [*Id.* at 365 (emphasis added).]

There is no question that, objectively, the purpose of the WRTL ads, as found by the district court, was a lawful one, namely, to seek legislative action to end the judicial filibuster issue then before the Senate of the United States,[36] **not** to corrupt the electoral process as a conduit for the "funneling [of] unregulated monies to an advocacy group to pay for ads that will influence a federal election," as the Intervenors have erroneously presumed. *See* Interv. Br., p. 30.

IV. AS APPLIED, BCRA SECTION 203 ABRIDGES WRTL'S FREEDOM OF SPEECH.

The FEC and the Intervenors have asserted that, while the WRTL ads on their face may appear to be issue advocacy — presumably protected by the freedom of speech — if read in context, subjectively they are electoral advocacy, outside First Amendment protection. *See* FEC Br., 19-20, 36-48; Interv. Br., pp. 15-16, 21-28. Thus, the FEC and Intervenors have faulted the district court for failure to inquire into the factual milieu surrounding the broadcast of the ads, with special emphasis upon WRTL's PAC activities opposing the reelection of Senator Feingold and documenting Senator Feingold's support of judicial filibusters. *See* FEC Br., pp. 8-11, 19-20, 40-43; Interv. Br., pp. 2-3, 9-11, 13-14, 15-16, 21-28. However, the FEC has failed to put in place the constitutionally-required free speech procedures by which one might obtain review of a

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[36] *See* WRTL v. FEC, 466 F. Supp. 2d at 207-208.

proposed issue ad in a timely way, thereby ensuring that an issue ad that was not intended to influence an election, nor have such an effect, could be broadcast during the 30-day or 60-day periods governed by BCRA's Section 203.

Forty-two years ago, in Freedman v. Maryland, 380 U.S. 51 (1965), this Court faced a similar problem in the enforcement of a Maryland motion picture obscenity censorship statute. Prior to Freedman, this Court had rejected a **facial** challenge to "a requirement of submission of motion pictures in advance of exhibition," similar to the requirement in the Maryland statute." *Id.*, 380 U.S. at 53. In Freedman, however, the Court rejected the claim that the prior facial ruling provided the standard by which to measure the constitutionality of the Maryland statute, as applied. Rather, the Court turned its attention to the "procedure for an initial decision by the censorship board" to ascertain whether that procedure "presents a danger of unduly suppressing protected expression." *Id.*, 380 U.S. at 54. After finding that the statute failed (a) to "put[] the [initial] burden of proving that the film is unprotected expression ... on the censor" and (b) to ensure a prompt "judicial determination in an adversary proceeding [which alone] ensures the necessary sensitivity to freedom of expression,"[37] the Freedman Court concluded that "the Maryland apparatus of censorship ... operates in a statutory context in which **judicial review** may be too little and too late," because, in effect, it conferred upon the censorship board "**excessive administrative discretion**." *Id.*, 380 U.S. at 57 (emphasis added).

In like manner here, the procedure available to WRTL to obtain review of its proposed ads before the 30-day and 60-day periods expired would have been "too little and too late." As

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[37] *Id.*, 380 U.S. at 58.

the district court found, "it is entirely unreasonable, if not fanciful, to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections ... in 2004," even "pursuant to BCRA section 403(a)(4) [which] expedited the disposition of this matter 'to the greatest possible extent....'" WRTL v. FEC, 466 F. Supp. 2d at 202. Even if WRTL had sought an advisory opinion from the FEC, as provided in 2 U.S.C. Section 437f(a)(1), it would have faced a 60-day period before the FEC would be obligated to render such an opinion and, if adverse or indecisive, WRTL would then have the burden of having to file for judicial review under BCRA Section 403(a)(4).[38] Thus, as was the case in Freedman v. Maryland, BCRA "lacks sufficient safeguards for confining [FEC's] action to **judicially determined constitutional limits.**" *See id.*, 380 U.S. at 57 (emphasis added). Without such safeguards in place, the FEC's and

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[38] CU, one of the *amici* which produces and distributes documentary films as an important part of its educational activities, has already experienced such a deprivation of its First Amendment rights. With respect to the broadcast of such a film produced in 2004 — *Celsius 41.11* — CU sought from the FEC recognition that the film (and advertising therefor), although mentioning candidates for federal office, were not electioneering communications because of the media exemption set forth in 11 C.F.R. § 100.29(c)(2). In Advisory Opinion ("AO") 2004-30 (Sept. 10, 2004), however, the FEC denied the exemption for the CU film on the grounds that the broadcasts would meet all of the definitional elements of an "electioneering communication" and CU "does not regularly produce documentaries or pay to broadcast them on television." *Id.* It would have been virtually impossible to obtain a judicial review of that determination within the next few weeks. As a consequence, CU was prohibited from broadcasting either the film or advertising for the film in the weeks preceding the 2004 presidential election with footage of President George W. Bush and Senator John F. Kerry. Both CU and CUF have produced a number of award-winning documentary films since that time, and other films — some of which mention current as well as potential candidates for federal office — are currently in production.

Intervenors' insistence upon a thorough contextual inquiry into the intent and effect of WRTL's ads would result in greater constitutional protection being provided to the purveyors of pornography than that available to the people engaged in core political speech.

V. AS APPLIED, BCRA SECTION 203 ABRIDGES WRTL'S FREEDOM OF THE PRESS.

Additionally, BCRA Section 203 runs afoul of WRTL's rights under the freedom of the press. While WRTL did not explicitly refer to the press freedom in its complaint, the district court resolved WRTL's claim according to "decades of First Amendment jurisprudence,"[39] relying heavily upon Thomas v. Collins, which stated:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights.... [*Id.*, 323 U.S. at 530.]

Thus, the freedom of the press, as well as the freedoms of speech, assembly and petition, is properly before this Court.[40]

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[39] *See* WRTL II, 466 F. Supp. 2d at 207.

[40] In McConnell, one group of the party plaintiffs (which included three of the *amici* filing this brief) relied expressly upon the freedom of the press in its facial challenge to BCRA Section 203. *See, e.g.*, Brief for Appellants Congressman Ron Paul, *et al.*, No. 02-1747 (S.Ct.), July 8, 2003, pp. 13-16. Unfortunately, this claim was overwhelmed by the "overbreadth" claim raised by the other parties, lost in the shuffle, not analyzed and summarily dismissed in a footnote which did not even identify the party which had

Although frequently overlooked in campaign finance litigation,[41] the freedom of the press was recognized by Congress to apply to the electoral process in the Federal Election Campaign Act of 1971, as amended ("FECA"), having exempted virtually all funds spent by the institutional media[42] in relation to federal elections from FECA coverage.[43] In BCRA, Congress used similar language to exempt the institutional media from its definition of "electioneering communication," excluding: "(i) a communication appearing in a **news story, commentary, or editorial** distributed through the facilities of any broadcasting station, **unless** such facilities are owned or controlled by any political party, political committee, or candidate...." BCRA Section 201(a); 2 U.S.C. § 434(f)(3)(B)(i) (emphasis added).[44]

Because the WRTL ads were neither broadcast as a news story, commentary, or editorial nor distributed through the facilities of any broadcasting station, they were not protected by this exemption. But the constitutional press freedom is not limited to the institutional press. Rather, it is a right belonging

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raised the issue, stating only that the issue "lacks merit." 540 U.S. 93, 209 n.89. However, this as-applied challenge demonstrates the continuing relevance of the press right in relation to the enforcement of campaign finance law.

[41] For example, freedom of the press is referenced only twice in Buckley v. Valeo, 424 U.S. at 92, 127 n.93.

[42] *See* FEC v. Phillips Publishing Co., 517 F. Supp. 1308, 1312 (D.D.C. 1981).

[43] *See* 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R. §§ 100.73 and 100.132.

[44] *See also* 11 C.F.R. § 100.29(c).

to all of the people,[45] and Congress is wholly without power to discriminate in favor of that segment of the press which has the most effective lobbyists and lawyers to ensure its protection.[46] As Justice Frankfurter observed in Pennekamp v. Florida, 328 U.S. 331, 364 (1946) that "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '...the liberty of the press is no greater and no less ...' than the liberty of every citizen of the Republic."[47] *Id.* at 802. Thus, outside the area of campaign finance, this Court has refused to differentiate between media and nonmedia defendants.[48] Indeed, in Pacific Gas & Electric Co. v. Public

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[45] *See* IV W. Blackstone, Commentaries on the Laws of England, pp. 151-52 (U. of Chi. Press, Facsimile. Ed.: 1769) ("**Every freeman** has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.") (emphasis added).

[46] It has been suggested that the reason the institutional press generally supports campaign finance reform is that this would give them a speech and press advantage over other communicators. *See* Joshua L. Shapiro, *Corporate Media Power, Corruption, and the Media Exemption*, 55 Emory L.J. 161 n.22 (2006); Lillian BeVier, *Campaign Finance Regulation: Less, Please*, 34 Ariz. St. L.J. 1115 (2002); *see generally* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 Tex. L. Rev. 1627, 1664 ("There is no surer way to turn the press against campaign finance reform than to subject the press to new restrictions.").

[47] *See also* Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 at 691 (1990) (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

[48] *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985). "Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants." *Id.* at 773 (White, J., concurring). *See also id.* at 783-84 (Brennan, J., dissenting).

Utilities Commission, 475 U.S. 1 (1986), the Court applied to a public utility company the freedom of the press principles it had earlier applied to a newspaper in Miami Herald Publishing Co. v. Tornillo (418 U.S. 241 (1974)).[49]

Even the FEC itself has applied the statutory press exemption beyond the institutional press. In Matter Under Review ("MUR") 2607, the FEC determined that an in-flight magazine distributed by Northwest Airlines, Inc. should be dismissed due to the press exemption, even though it was not part of the institutional press. Similarly, in MUR 5315, the FEC decided to take no action against Wal-Mart Stores, Inc. for publishing a magazine which appeared to reproduce certain portions of the campaign literature of a candidate for the U.S. Senate. At that time, three of the six commissioners issued a Statement of Reasons which took the view that "the press exemption should be broadly construed to insulate the content of publications (and editorial judgment of publishers) from regulation." Statement of Reasons for MUR 5315, p. 5 (Aug. 25, 2003). Also, in AO 2005-16, the FEC applied a two-step test to determine that the press exemption covered websites owned by a corporation which disseminated stories, commentary, or editorials, even if it evidenced "a lack of objectivity" or even if it "expressly advocates the election or defeat of a clearly identified candidate for federal office." AO 2005-16, p. 6.

Only if the freedom of the press were merely a discretionary matter of legislative grace would the FEC have the latitude to confer it solely upon the institutional press while regulating all other publications. And, as Justice Thomas pointed out in his

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[49] "The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant [a public utility corporation] as well as to the institutional press." Pacific Gas & Electric, *supra*, 475 U.S. 1, 11.

McConnell dissent, if the current press exemption in the nation's campaign finance law is not rooted in freedom of the press, but rather based solely upon the wisdom and experience of Congress, then even the institutional press exemption may be in jeopardy:

> Media companies can run procandidate editorials as easily as nonmedia corporations can pay for advertisements. Candidates can be just as grateful to media companies as they can be to corporations and unions.... Media corporations are influential. There is little doubt that the editorials and commentaries they run can affect elections. [McConnell, 540 U.S. at 283-84 (Thomas, J., dissenting).]

Under the current press exemption, the FEC could not dictate to a radio or television station the content of its editorials or commentaries on the ground that they were intended to influence, and had the effect of influencing, an election.[50] Indeed, such an interference with the station's editorial judgment would violate the freedom of the press, because this Court has insisted that the freedom of the press protects the "editorial function" of the publisher or disseminator from government censorship, whether the power to censor be exercised to edit out,[51] or to edit in.[52] Additionally, the autonomy of editorial control is also violated by a

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[50] *See* CBS v. Dem. Nat'l.Comm., 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring).

[51] *See* Near v. Minnesota, 283 U.S. 697, 712-14 (1931); New York Times v. United States, 403 U.S. 713, 717-19, 723-25, 733 (1971).

[52] *See* Miami Herald v. Tornillo, 418 U.S. at 241, 247-54, 256, 258 (1974).

regulation which impairs the financial ability of a person to exercise editorial control. *See* Miami Herald, 418 U.S. at 255-58. The electioneering communication provisions of BCRA as applied to WRTL violate WRTL's editorial control over the message it wants to communicate, by limiting the use of a candidate's name and by imposing financial conditions upon its right as a "freeman ... to lay **what sentiments he pleases** before the public." *See* IV Blackstone's Commentaries, p. 151 (emphasis added).

Although the consequence of properly applying freedom of the press beyond the institutional press to every "freeman" would profoundly affect the area of campaign finance,[53] it would do no more than require the Congress to live within its constitutional limitations while allowing the restoration of the unfettered liberty of the people to participate in both choosing and then influencing their elected officials.

CONCLUSION

For the reasons stated in Parts I A. and B., and II through IV, the ruling of the district court should be affirmed. For the reasons stated in Parts I C. and V., McConnell and Buckley should be reconsidered, and the ruling of the district court should be affirmed on grounds that BCRA Section 203 violates WRTL's freedom of the press.

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[53] Federal election law has long been employed to protect incumbents by granting candidates an exclusive "trademark" on the use of their name by prohibiting an entity other than a candidate's authorized committees to use a candidate's name. 2 U.S.C. § 432(e)(A)(4). Therefore, today it is illegal for citizens to organize themselves politically under a name which clearly communicates their purpose to defeat an incumbent, such as "Citizens Against John Smith," even "Citizens For Jane Doe" being prohibited.

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